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No. _____

In The
Supreme Court of the United States

SHELLY PARKER, TOM G. PALMER, GILLIAN ST. LAWRENCE, TRACEY AMBEAU, AND GEORGE LYON,

Cross-Petitioners,

v.

DISTRICT OF COLUMBIA AND MAYOR ADRIAN M. FENTY,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in holding, in acknowledged conflict with this Court's decisions in *Babbitt* v. *United Farm Workers National Union,* 442 U.S. 289 (1979) and *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383 (1988), that cross-petitioners cannot maintain a pre-enforcement constitutional challenge to a criminal law without showing that they "have been singled out or uniquely targeted by the D.C. government for prosecution." Petitioners' Appendix ("Pet. App.") at 7a.

LIST OF PARTIES

Cross-Petitioners Shelly Parker, Tom G. Palmer, Gillian St. Lawrence, Tracey Ambeau, and George Lyon ("Cross-Petitioners"), along with Respondent Dick Anthony Heller, initiated the proceedings below by filing a complaint against Cross-Respondent District of Columbia and its former Mayor, Anthony Williams, in the United States District Court for the District of Columbia. Cross-Petitioners and Respondent Heller (collectively "Respondents") appealed the District Court's ruling to the United States Court of Appeals for the District of Columbia Circuit.

Cross-Respondent Adrian Fenty was substituted for Anthony Williams by the Court of Appeals upon his succession to the Mayoralty. The District of Columbia and the Mayor are hereafter referred to as "Petitioners."

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Shelly Parker, Tom G. Palmer, Gillian St. Lawrence, Tracey Ambeau, and George Lyon respectfully cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS AND ORDERS BELOW

The District of Columbia Circuit's opinion is reported at 478 F.3d 370 (D.C. Cir. 2007). See Pet. App. at 1a-70a. The district court's opinion is reported at 311 F. Supp. 2d 103 (D.D.C. 2004). See Pet. App. at 71a-83a.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2007. A petition for rehearing was denied on May 8, 2007. Petitioners sought and obtained an extension of time for filing a petition for a writ of certiorari until September 5, 2007. The petition was filed on September 4, 2007, and placed on the Court's docket on September 5, 2007, under case number 07-290. This conditional cross-petition is being filed pursuant to Rule 12.5 of the Rules of the Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment to the United States Constitution is reproduced on Page 1 of the petition. D.C. Code §§ 7-2501.01(12), 7-2502.01, 7-2502.02, and 7-2507.02 are reproduced in the appendix to the petition. Pet. App. at 91a-98a. D.C. Code §§ 7-2507.02, 7-2507.06, 22-4504, and 22-4515, are reproduced in the Appendix to this cross-petition, App. at 39-41.

STATEMENT

On February 10, 2003, Cross-Petitioners and Respondent Heller brought this lawsuit in the United States District Court for the District of Columbia against the District of Columbia and its then-Mayor Anthony Williams, challenging the constitutionality of Washington, D.C.'s various bans on the possession of handguns and functional firearms within the home. The district court had jurisdiction over the subject matter of the case under 28 U.S.C. § 1331 and § 1343.

On April 4, 2003, another lawsuit challenging the same laws, *Seegars* v. *Ashcroft*, was filed in the U.S. District Court for the District of Columbia. *Seegars* asserted a number of legal theories and claims different than those advanced by Respondents in this case. The *Seegars* plaintiffs moved to consolidate their case with this one, but that motion was denied. App. at 1-2. Thereafter the cases proceeded on separate tracks.

Attorney General Ashcroft, a defendant in *Seegars* but not in the instant case,[1] moved to dismiss *Seegars* for lack of standing. Although the Mayor was a defendant in *Seegars*, the Petitioners failed to raise any standing arguments in this case (*Parker* v. *District of Columbia*) until prompted to do so by the district court during a hearing on the parties' cross-dispositive motions. Indeed, Petitioners' counsel admitted that Petitioners had no intention of questioning Respondents' standing to challenge the law had the district court not raised the issue. App. at 4-6. Petitioners' amici likewise failed to raise standing in their briefing. App. at 6-8.

Throughout the proceedings below, Petitioners repeatedly conceded what is common knowledge, namely that they zealously enforce Washington, D.C.'s gun laws. For example, Respondents filed a motion for summary judgment with thirty-four separate assertions of undisputed material facts, the last of which stated that "Defendants actively enforce D.C. Code §§ 7-2502.01(a), 7-2502.02(a)(4), 7-2507.02, and 22-4504." App. at 19. Petitioners did not contest this assertion. App. at 20-23. Respondents also asserted that Petitioners do not issue the required permits to carry firearms inside one's home, and Petitioners conceded this point as well. App. at 18 (undisputed material fact no. 32). The district court was thus free to treat these allegations as admitted. D.D.C. LCvR 7.1(h), 56.1.

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[1] The laws at issue are misdemeanors, not felonies. In the District of Columbia, misdemeanors are prosecuted by the District of Columbia's Office of the Attorney General. D.C. Code § 23-101(a).

Petitioners have proclaimed their vigorous enforcement of the challenged laws. For example, Mayor Williams and Police Chief Charles Ramsey held a "town hall" meeting concerning these laws, attended by Respondents Parker, Heller, and St. Lawrence. Williams called the gun ban a "core law" of the city, part of its "fundamental core culture." In response to a complaint by an Advisory Neighborhood Commissioner that criminals arrested with guns quickly re-appear on the streets with new guns, Mayor Williams stated, in part, "we need tougher enforcement." App. at 24, 26, 28.

Police Chief Ramsey called the challenged laws "good solid laws," and warned, "if we relax our gun laws . . . we are opening the floodgates . . . for unintended [bad] consequences." Ramsey added that 2,000 guns were confiscated in each of the previous two years, and his department confiscated 1,400 guns in the first half of 2005. App. at 25, 27, 29.

Petitioners have repeatedly confirmed that they would prosecute Respondents for violation of the challenged laws if Respondents were to possess handguns or other functional firearms within their homes. The district court verified that Petitioners would prosecute Respondents for violating the challenged statutes.

> THE COURT: . . . The city is not going to essentially grant immunity to these people. If they go out and take steps to possess firearms, they'll be prosecuted, I assume. They're not going to get a free ride because they're a plaintiff in this case, are they?
>
> MS. MULLEN: No, and I think that Your Honor is correct, but I don't think *the*

> *fact that if, in fact, they break the law and we would enforce the law that they're breaking*, that that necessarily confers automatic standing on them in this case . . . .

App. at 5 (emphasis added). Cross-Petitioners St. Lawrence and Lyon, and Respondent Heller, were present in the courtroom to hear Petitioners' attorney confirm that they would be prosecuted were they to act on their present intention to exercise their constitutional rights.

Petitioners later confirmed to the court of appeals that "*if* they [Respondents] break a law, the District would normally enforce it." App. at 33 (emphasis in original).

These specific prosecutorial threats against Respondents were consistent not only with Petitioners' well-known zealous enforcement of the law, but also with their statements to the press regarding this case. In a front-page *Washington Times* article about this lawsuit, Mayor Williams' official spokesperson and the District's Deputy Mayor for Public Safety and Justice reiterated the city's commitment to enforcing the gun bans and expressed their belief that Respondents would pose a danger to themselves and to others, including children, "which is not what we want." Jon Ward, *Residents Challenge District's Gun Ban*, WASHINGTON TIMES, February 12, 2003, p. A1.

After receiving additional briefing from the parties on the question of standing, the district court issued a decision on the merits that made no mention of standing and thus tacitly rejected the Petitioners' belated arguments on that point. Though recognizing the "many thought-provoking and historically interesting arguments for

finding an individual right" protected by the Second Amendment, the district court held that no such right exists. Pet. App. at 83a.

Meanwhile, in the parallel *Seegars* litigation, the district court had accepted the standing defense asserted by Attorney General Ashcroft (and adopted but not briefed by Mayor Williams) as against all but one of the plaintiffs in that case. Because the district court found that one of the *Seegars* plaintiffs had standing, it reached the merits of that case, and held for defendants on all causes of action. *Seegars* v. *Ashcroft*, 297 F. Supp. 2d 201 (D.D.C. 2004).

Seegars reached the court of appeals first, and the court held that none of the *Seegars* plaintiffs had standing to maintain their challenge to the District's firearms prohibitions. *Seegars* v. *Ashcroft*, 396 F.3d 1248 (D.C. Cir. 2005). The court accepted that "the conduct that plaintiffs would engage in is at least arguably affected with a constitutional interest," *id.* at 1254, and accepted the "assurance of [plaintiffs'] conditional intent to commit acts that would violate the law," *id.* at 1255, but nonetheless found plaintiffs lacked standing because they "allege[d] no prior threats against them or any characteristics indicating an especially high probability of enforcement against them." *Id.*

In reaching this conclusion, the court of appeals explained that it felt bound by its precedent in *Navegar, Inc.* v. *United States*, 103 F.3d 994 (D.C. Cir. 1997). Yet the panel expressed reservations about that case. "We cannot help noting that *Navegar*'s analysis is in sharp tension with standard rules governing preenforcement challenges to agency regulations," *Seegars*, 396 F.3d at 1253, and that

"[t]here is also tension between *Navegar* and our cases upholding preenforcement review of First Amendment challenges to criminal statutes." *Id.* at 1254.

The court also conceded that *Navegar* was inconsistent with the pre-enforcement standing requirements of at least one circuit, *id.* at 1255, and, more critically, with the pre-enforcement standing requirements announced by this Court. The court of appeals noted that "the idea of a special First Amendment rule for preenforcement review of statutes seems to have no explicit grounding in Supreme Court decisions," and indeed that this Court "conspicuously neglected to mention [such a] point in its discussion of standing" in *Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289, 297-302 (1979). *Seegars*, 396 F.3d at 1254.

"Despite these apparent tensions," *Seegars* applied *Navegar* to deny standing, "*not* because it represents our 'law of firearms,' . . . [but] because it represents the only circuit case dealing with a non-First Amendment preenforcement challenge to a criminal statute that has not reached the court through agency proceedings." *Id.* at 1254 (emphasis in original) (citations omitted).

Among the votes for en banc review of *Seegars* was that of the current Chief Justice of the United States. *Seegars* v. *Gonzales*, 413 F.3d 1 (D.C. Cir. 2005). On January 23, 2006, this Court denied a petition for certiorari in *Seegars*. *Seegars* v. *Gonzales*, 546 U.S. 1157 (2006).

Nine months after its decision in *Seegars*, the court of appeals granted Respondents' motions to have their case proceed, and denied Petitioners' motions for summary affirmance. The court of appeals instructed the parties "to

address both standing and the merits of the case in their briefs." App. at 36.

The court of appeals heard argument in this case on December 7, 2006. The following month, this Court issued its opinion in *Medimmune, Inc.* v. *Genentech*, 127 S. Ct. 764 (2007). Respondents promptly filed a letter pursuant to Fed. R. App. P. 28(j), advising the court of appeals panel of *Medimmune* and noting its incompatibility with circuit precedent that would deny Respondents' standing. App. at 37-38.

On March 9, 2007, the court of appeals reversed the district court's decision in *Parker*. Pet. App. at 1a-70a. With respect to Respondents' standing, the court of appeals held that "we are obliged to look for an allegation that appellants here have been singled out or uniquely targeted by the D.C. government for prosecution." Pet. App. at 7a. Addressing the various threats of prosecution identified by Respondents, the court of appeals held that "[n]one of the statements cited by appellants expresses a 'special priority' for preventing *these* appellants from violating the gun laws, or a particular interest in punishing *them* for having done so." Pet. App. at 8a (emphasis in original).

Accordingly, the court of appeals held that Respondents lacked standing to assert a pre-enforcement constitutional challenge. However, as Respondent Heller had been denied a registration permit for a handgun, the court of appeals found he had standing to pursue his claim against the handgun ban. *Id.* Because the other challenged gun ban provisions "would amount to further conditions on the certificate Heller desires, Heller's standing to pursue the license denial would subsume these other claims too."

Id. Then, reaching the merits, the court of appeals held that the city's bans on the home possession of functional firearms by law-abiding, adult citizens is inconsistent with "the right of the people to keep and bear arms" secured by the Second Amendment. Pet. App. at 54a-55a.

Respondents support Petitioner's petition for certiorari, but will address the various misstatements of fact and law contained in that petition in their response. Sup. Ct. R. 15.2. This separate cross-petition is conditional upon the grant of the petition for certiorari.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

I. On the Issue of Standing, the Opinion Below Admittedly Contradicts This Court's Settled Precedent.

The court of appeals' conclusion that Respondent Heller had standing to contest the denial of his permit application and maintain his other related claims was an unremarkable and routine application of settled law. But the same cannot be said of the court's treatment of pre-enforcement standing with respect to Cross-Petitioners. That the D.C. Circuit's pre-enforcement standing doctrine conflicts with this Court's settled precedent requires little annotation, as the court of appeals all but admitted that its decision below "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). As the court of appeals put it,

> The unqualified language of *United Farm Workers* would seem to encompass the claims raised

> by the *Seegars* plaintiffs, as well as the appellants here. Appellants' assertions of Article III standing also find support in the Supreme Court's decision in *Virginia* v. *American Booksellers Ass'n*. . . . In that case, the Court held it sufficient for plaintiffs to allege "an actual and well-founded fear that the law will be enforced against them," without any additional requirement that the challenged statute single out particular plaintiffs by name. In both *United Farm Workers* and *American Booksellers*, the Supreme Court took a far more relaxed stance on pre-enforcement challenges than *Navegar* and *Seegars* permit. Nevertheless, unless and until this court en banc overrules these recent precedents, we must be faithful to *Seegars* just as the majority in *Seegars* was faithful to *Navegar*.

Pet. App. at 6a-7a (internal citations and footnote omitted).

On denial of re-hearing en banc in *Seegars*, the panel opinion's author explained, "[a]s a panel we were constrained by recent circuit authority, *Navegar*, even though, as my opinion for the court made clear, it appeared to be in conflict with an earlier Supreme Court decision, *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289 (1979)." *Seegars* v. *Gonzales*, 413 F.3d 1, 2 (D.C. Cir. 2005) (Williams, Senior Circuit Judge) (first citation omitted).

This past term, in its most recent examination of standing to assert pre-enforcement actions under the Declaratory Judgment Act, 28 U.S.C. § 2201, et seq., this Court explained:

> [W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the

> basis for the threat – for example, the constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.

Medimmune, Inc. v. *Genentech, Inc.*, 127 S. Ct. 764, 772 (2007) (emphasis omitted).

Reviewing its history of cases affirming the constitutionality of pre-enforcement standing, this Court explained,

> [i]n each of these cases, the plaintiff had eliminated the imminent threat of harm by simply not doing what he claimed the right to do. . . . That did not preclude subject-matter jurisdiction because the threat-eliminating behavior was effectively coerced.

Id.

Medimmune, *Babbitt*, and *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383 (1988), are flatly incompatible with *Navegar*, *Seegars*, and now the case at bar. Time and again this Court has explained that a statute's coercive effect is an Article III injury. Nevertheless, for the second time in three years, the D.C. Circuit has held precisely such an injury inadequate to confer standing upon citizens who have indisputably suffered it.

II. On the Issue of Standing, the Opinion Below Conflicts with Other Federal Courts of Appeals.

Considering that the D.C. Circuit's standing doctrine deviates so widely from this Court's precedent, it is not surprising that the decision below is "in conflict with the

decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a).

The *Seegars* court acknowledged that its application of standing led to a squarely different result than that reached by the Sixth Circuit under similar factual circumstances in *People's Rights Organization* v. *City of Columbus*, 152 F.3d 522 (6th Cir. 1998) (standing to challenge gun ban by plaintiffs possessing weapons outside of jurisdiction). *Seegars*, 396 F.3d at 1255. See also *Gillespie* v. *City of Indianapolis*, 185 F.3d 693, 710-11 (7th Cir. 1999) (police officer had standing to assert challenge to prohibition on firearms possession by persons convicted of domestic violence offenses); accord *Coalition of New Jersey Sportsmen* v. *Whitman*, 44 F. Supp. 2d 666, 673 n.10 (D.N.J. 1999), *aff'd*, 263 F.3d 157 (3d Cir. 2001) (manufacturers possessed standing to challenge state bans of certain firearms).

If anything, "[t]here may be a trend in favor of . . . a practical approach" to standing, where "courts are content with any realistic inferences that show a likelihood of prosecution." *New Hampshire Hemp Council, Inc.* v. *Marshall*, 203 F.3d 1, 5 (1st Cir. 2000). The D.C. Circuit's standing approach is unique.

III. The D.C. Circuit's Erroneous Standing Doctrine Renders the Declaratory Judgment Act a Dead Letter in the Nation's Capital.

Cross-Petitioners' "predicament – submit to a statute or face the likely perils of violating it – is precisely why the declaratory judgment cause of action exists." *Mobil Oil Co.* v. *Attorney Gen. of Va.*, 940 F.2d 73, 74 (4th Cir. 1991). As the D.C. Circuit itself has acknowledged,

> [t]o require litigants seeking resolution of a dispute that is appropriate for adjudication in federal court to violate the law and subject themselves to criminal prosecution before their challenges may be heard would create incentives that are perverse from the perspective of law enforcement, unfair to the litigants, and totally unrelated to the constitutional or prudential concerns underlying the doctrine of justiciability.

Navegar, Inc. v. *United States*, 103 F.3d 994, 1000-01 (D.C. Cir. 1997).

Yet those are precisely the consequences of allowing the court of appeals to continue demanding specific, individualized threats of prosecution as a pre-requisite for pre-enforcement challenges to criminal statutes. Government officials enforcing an unconstitutional law may avoid civil review of their conduct in federal courts simply by not issuing threats. After all, once a person is arrested and becomes the subject of criminal proceedings, the federal courts must abstain from hearing any civil challenge by the accused to the law's constitutionality. *Younger* v. *Harris*, 401 U.S. 37 (1971).[2]

Thus, applying both *Younger* and *Navegar* together, government officials in the D.C. Circuit are afforded immunity from federal court review of potentially unconstitutional laws. This result obtains even when the government maintains, as it does with respect to the laws here at issue, a harsh "zero tolerance" policy of zealous

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[2] The District of Columbia is treated as a state for purposes of *Younger* abstention. *JMM Corp.* v. *District of Columbia*, 378 F.3d 1117 (D.C. Cir. 2004); *Worldwide Moving & Storage, Inc.* v. *District of Columbia*, 445 F.3d 422 (D.C. Cir. 2006).

enforcement against all violators, bragging of thousands of prosecutions a year and declaring the laws to be an aspect of the government's "fundamental core culture." Notably, the district court, by questioning Petitioners' counsel in open court, removed any doubt that Cross-Petitioners would be prosecuted were they to violate the challenged laws.

Indeed, under the D.C. Circuit's erroneous standing doctrine, complete immunity from federal review of government conduct may be obtained by simply eliminating any administrative processes. Had the D.C. government enacted a criminal prohibition on the possession of firearms without including the mechanism of an illusory permit process, nobody could challenge the laws at issue in this case except in the context of a "state court" criminal proceeding[3] – notwithstanding the fact that the government openly threatens the entire population with criminal prosecution for violating the challenged laws.[4]

The D.C. Circuit's standing doctrine amounts to a wholesale refusal to hear a large class of cases arising under the Declaratory Judgment Act – namely, any "non-First Amendment preenforcement challenge to a criminal statute that has not reached the court through agency

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[3] The challenged laws are prosecuted as misdemeanors in the District of Columbia's Article I courts. But like residents of the fifty states, Respondents have a right to access Article III courts to resolve disputes arising under the Constitution. See, e.g., *O'Donoghue* v. *United States*, 289 U.S. 516 (1933).

[4] See *FEC* v. *Atkins*, 524 U.S. 11, 24 (1998) ("Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found 'injury in fact.'") (citation omitted).

proceedings." *Seegars*, 396 F.3d at 1254. As the court of appeals noted, this is not only a "law of firearms." *Id.* For example, had the District of Columbia enacted the abortion restrictions struck down in *Roe* v. *Wade*, 410 U.S. 113 (1973) or *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992), neither case would have reached this Court. Jane Roe averred no specific, personalized threats of prosecution were she to obtain an abortion. And in *Casey*, the petitioners initiated the litigation "[b]efore any of [the challenged] provisions took effect." *Casey*, 505 U.S. at 845. Plaintiffs in those two cases could not have claimed more immediate or "concrete" threats of enforcement than those leveled at Respondents here.

In demanding individualized threats of prosecution, a pre-enforcement challenge is virtually always too early, since even the government's open-court vow to prosecute a plaintiff is apparently too generalized a threat. But if a threat is not sufficiently particularized until it rises to the level of actual arrest and prosecution, the putative plaintiff can only be a criminal defendant, owing to *Younger* abstention. In that respect, a post-enforcement civil challenge is always too late.

The court of appeals' standing error is particularly troubling because it represents the law of the circuit that has direct jurisdiction over the seat of federal government. The impact of this errant doctrine is thus widespread and significant because it substantially curtails the people's right to access the federal courts to obtain judicial review of governmental conduct – not only by the District of Columbia, as in this case, but by the federal government as well. Restoring a pre-enforcement right of access to

federal courts, regardless of the Court's decision on the merits of Respondents' claims, is essential.

CONCLUSION

Cross-Petitioners respectfully request that the Court take this opportunity to clarify that pre-enforcement challenges under the United States Constitution may be heard in the nation's capital without demonstration of a personalized prosecutorial threat.

Respectfully Submitted,

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September 10, 2007

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELLY PARKER, *et al.*, Plaintiffs, v. DISTRICT OF COLUMBIA, *et al.*, Defendants.	Civil Action No. 03-0213 (EGS) (Filed Jul 8, 2003)
SANDRA SEEGARS, *et al.*, Plaintiffs, v. JOHN D. ASHCROFT, *et al.*, Defendants.	Civil Action No. 03-0834 (RBW) (Filed Jul 8, 2003)

ORDER

Upon consideration of the motion to consolidate Civil Action No. 1:03-0213 (EGS) with Civil Action No. 1:03 CV 0834 (RBW), filed by plaintiffs in Civil Action No. 1:03 0834, and the motion to strike plaintiffs' declarations or, in the alternative, for leave to file a response to plaintiffs' reply to opposition to motion for recusal of counsel, filed by plaintiffs in Civil Action No. 1:03-0834, and which the Court shall construe as a sur-reply to the motion for recusal of counsel filed by plaintiffs in Civil Action No. 1:03 CV 0213, it is by the Court hereby **ORDERED** that the motion to consolidate is **denied** and that the motion for leave to file a sur-reply to plaintiffs' motion for recusal of counsel is **granted.**

Consolidation of the two cases would require resolution of complex attorney-client ethical and professional responsibility issues prior to any attempt to resolve the underlying substantive issues. Accordingly, in an effort to avoid any protracted delay in the resolution of the merits in either case, the Court will not consolidate the two cases.

Date: 7/2/03 /s/ Emmet G. Sullivan
EMMET G. SULLIVAN
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELLY PARKER, ET AL.,	)	
	)	C.A. No. 03-213 (EGS)
VS.	)	WASHINGTON, D.C.
	)	OCTOBER 14, 2003
DISTRICT OF COLUMBIA, ET AL.	)	10:00 A.M.
	)	

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:	ALAN GURA, ESQ. CLARK M. NEILY, III, ESQ. GENE HEALY, ESQ
FOR THE DEFENDANTS:	MARTHA J. MULLEN, ESQ. DANIEL A. REZNECK, ESQ.
FOR THE AMICI:	MATHEW S. NOSANCHUK, ESQ. DAVID M. GOSSETT, ESQ. FATIMA A. GOSS, ESQ. JOHN A. VALENTINE, ESQ. BRIAN J. SIEBEL, ESQ.
COURT REPORTER:	FRANK J. RANGUS, OCR U. S. COURTHOUSE, RM. 6822 WASHINGTON, D.C. 20001 (202) 371-0545

* * *

[7] THE COURT: I THINK I'VE HEARD ENOUGH. THANK YOU. LET ME HEAR FROM THE CITY. THE CITY HAS NOT RAISED STANDING. DO YOU CONCEDE THAT THERE IS STANDING?

MS. MULLEN: NO, YOUR HONOR, WE HAVEN'T CONCEDED THAT THERE'S STANDING, AND AS PLAINTIFF –

THE COURT: YOU DIDN'T RAISE THAT AS A BASIS FOR YOUR MOTION TO DISMISS.

MS. MULLEN: NO, WE DID NOT. WE RELIED ON –

THE COURT: WHY DIDN'T YOU RAISE IT? AND IF IT'S NOT BEEN RAISED, HAS IT NOT BEEN WAIVED?

[8] MS. MULLEN: NO, I DON'T BELIEVE THAT WE'VE NECESSARILY WAIVED IT.

THE COURT: WHEN WERE YOU PLANNING TO RAISE IT? HAD I NOT RAISED IT, WERE YOU GOING TO RAISE IT TODAY?

MS. MULLEN: NO, I WAS NOT PLANNING ON RAISING IT TODAY.

THE COURT: WHEN WERE YOU GOING TO RAISE IT? ON APPEAL?

MS. MULLEN: THE ISSUE WAS RAISED IN THE SEEGARS CASE AS IT APPLIED TO THE U. S. WE DIDN'T RAISE IT IN THE PARKER CASE, AND I CAN ADDRESS THAT BRIEFLY, BUT IT'S NOT ANYTHING

THAT WE HAVE PRESENTED TO THE COURT THUS FAR. I DON'T BELIEVE THAT THEY HAVE STANDING, AND WE ADOPTED, INCORPORATED THE ARGUMENTS THAT WERE PRESENTED IN THE SEEGARS CASE, THE COMPANION CASE, WHICH I KNOW YOU READ THE TRANSCRIPT. THE ORAL ARGUMENT WAS LAST WEEK, BEFORE JUDGE WALTON, AND I THINK WE WOULD AGREE THAT THERE HAS TO BE A MUCH TIGHTER NEXUS. WHAT PLAINTIFFS HAVE ALLEGED HERE IS ABSTRACT.

THE COURT: WHY IS IT ABSTRACT? THE CITY IS NOT GOING TO ESSENTIALLY GRANT IMMUNITY TO THESE PEOPLE. IF THEY GO OUT AND TAKE STEPS TO POSSESS FIREARMS, THEY'LL BE PROSECUTED, I ASSUME. THEY'RE NOT GOING TO GET A FREE RIDE BECAUSE THEY'RE A PLAINTIFF IN THIS CASE, ARE THEY?

MS. MULLEN: NO, AND I THINK THAT YOUR HONOR IS CORRECT, BUT I DON'T THINK THE FACT THAT IF, IN FACT, THEY [9] BREAK THE LAW AND WE WOULD ENFORCE THE LAW THAT THEY'RE BREAKING, THAT THAT NECESSARILY CONFERS AUTOMATIC STANDING ON THEM IN THIS CASE. ITS STILL A SITUATION WHERE YOU'RE DEALING, WITH THE ABSTRACT.

THE COURT: I GUESS I'M JUST CURIOUS AND SOMEWHAT CONFUSED. WHEN WAS THE CITY GOING TO RAISE STANDING? IF THE CITY IS CONCERNED THAT THERE'S A LACK OF STANDING, WHEN WERE YOU GOING TO ASSERT THAT ARGUMENT? I RAISED IT JUST BECAUSE OF MY CURIOSITY ABOUT IT. WHEN WAS THE CITY PLANNING TO

EITHER ARGUE LACK OF STANDING OR RAISE THE ISSUE?

MS. MULLEN: WELL, I THINK WHAT HAPPENED WAS, THE CASES WERE THOUGHT TO BE COMPANION CASES, AND THEREFORE, BY ADOPTING THE ARGUMENT THAT WAS PRESENTED BY THE UNITED STATES GOVERNMENT IN THE SEEGARS CASE, THAT WE HAD INCORPORATED THAT SAME RATIONALE IN PART, ALTHOUGH IT WAS NEVER EXPLICITLY BRIEFED.

* * *

[46] THE COURT: BUT YOU'RE ASKING ME NOW TO ESSENTIALLY ADOPT THE FEDERAL GOVERNMENT'S ARGUMENT IN THE SEEGARS CASE, THEN?

MS. MULLEN: YES.

THE COURT: ALL RIGHT. HAD I NOT –

MS, MULLEN: OR WE CAN, SINCE WE HAVE NOT WAIVED THE ISSUE. WE CAN BRIEF IT.

THE COURT: I'M CURIOUS. HAD I NOT RAISED THE ISSUE, WERE YOU GOING TO RAISE IT THIS MORNING?

MS. MULLEN: NO, I HAD NOT INTENDED ON RAISING IT THIS MORNING.

* * *

[73] THE COURT: I DON'T RECALL IF YOU, IN YOUR BRIEF, ADDRESS THE ISSUE OF STANDING OR NOT. I DON'T RECALL.

MR. NOSANCHUK: WE DID NOT ADDRESS THE ISSUE OF STANDING.

THE COURT: IS THERE STANDING HERE?

MR. NOSANCHUK: NO. I WOULD AGREE WITH THE COURT.

THE COURT: EVERYONE RECOGNIZES ON THIS SIDE THERE'S NO STANDING, BUT NO ONE RAISED IT. I FIND IT MYSTIFYING.

MR. NOSANCHUK: RIGHT. WELL, YOUR HONOR, WE WOULD, OBVIOUSLY, BE HAPPY TO SUBMIT SUPPLEMENTAL BRIEFING.

THE COURT: NO. I WAS JUST ASKING QUESTIONS. I'M NOT TRYING TO SIGNAL MY OPINION THAT THERE'S NOT STANDING. IT WAS JUST A LEGITIMATE QUESTION TO ASK. SO I HOPE I'M NOT SENDING THE WRONG SIGNALS TO EVERYONE THAT THERE'S NO STANDING HERE. BUT, I MEAN, CONSTITUTIONAL SCHOLARS AND LAWYERS OF LONG STANDING AND NO ONE RAISED IT? DON'T TURN YOUR HEAD AWAY. I MEAN, IF I HADN'T RAISED IT, IT WAS NOT GOING TO BE RAISED?

MR. NOSANCHUK: WELL, AS YOUR HONOR WELL RECOGNIZES, YOU KNOW, THE FAILURE OF A PARTY TO RAISE IT DOESN'T WAIVE THE ISSUE.

THE COURT: IT DOESN'T?

MR. NOSANCHUK: NO, AND YOU'RE FAMILIAR WITH THE TRANSCRIPT FROM THE HEARING IN SEEGARS WHERE THAT WAS DISCUSSED

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELLY PARKER, et al., Plaintiffs, v. DISTRICT OF COLUMBIA, et al., Defendants.	Case No. 03-CV-0213-EGS **SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [LCvR 7.1(h), 56.1]**

SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

COME NOW the Plaintiffs, Shelly Parker, Dick Anthony Heller, Tom G. Palmer, Gillian St. Lawrence, Tracey Ambeau, and George Lyon, by and through undersigned counsel, and submit their Separate Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment.

Dated: March 14, 2003

Respectfully Submitted,

Alan Gura (D.C. Bar No. 453449)
Gura & Day, LLC
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Attorneys for Plaintiffs

SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

	FACT		RECORD
1.	Plaintiff Parker resides in a high crime area of the District of Columbia	1.	Parker Decl., ¶ 1.
2.	Plaintiff Parker is very active in community affairs, organizing her community against drug dealers.	2.	Parker Decl., ¶ 2.
3.	Drug dealers have identified plaintiff as being adverse to their interests and have threatened her and her neighbors.	3.	Parker Decl., ¶ 3.
4.	On June 12, 2002, the back window of plaintiff Parker's car was broken. Her front window has been broken, a security camera was stolen from the outside of her home, and a drug user who acts as a lookout for the drug dealers on Parker's block smashed his car into her back fence.	4.	Parker Decl., ¶ 4.
5.	On the night of February 12, 2003, the date on which the *Washington Times* carried a front-page article about this lawsuit and Parker's role in it, a drug dealer she knew as "Nanook" started banging	5.	Parker Decl., ¶ 5.

	on Parker's door and tried to pry his way into her house, repeatedly yelling, "bitch, I'll kill you, I live on this block, too."		
6.	"Nanook" was eventually arrested and may be prosecuted. However, it has become apparent to Parker that her local police lieutenant is not going to do very much about the drug problem on her block.	6.	Parker Decl., ¶ 6.
7.	Parker presently intends to possess a functional handgun within her home for self-defense, but is prevented from doing so only by defendants' active enforcement of unconstitutional policies complained of in this action. Parker is aware that she faces criminal penalties if she possesses a handgun, or any other functional firearm, at home.	7.	Parker Decl., ¶ 7.
8.	Being deprived of a handgun limits Parker's ability to defend herself and her ability to act in concert with others for the common good. While Parker can use a handgun to defend herself, she cannot use a rifle or shotgun nearly as	8.	Parker Decl., ¶ 8.

effectively as she could use a handgun, as a rifle or shotgun would be too unwieldy for her to use.

9. Plaintiff Dick Heller resides in a high-crime neighborhood of the District of Columbia, on Kentucky Avenue, S.E. There are two open-air drug markets in the immediate vicinity of his home.

9. Heller Decl., ¶ 1.

10. Plaintiff Heller is a Special Police Officer of defendant District of Columbia. As a Special Police Officer, he is licensed to and does carry a handgun in the course of his employment at the Thurgood Marshall Federal Judicial Center in Washington, D.C., providing security for the federal judiciary.

10. Heller Decl., ¶ 2.

11. Plaintiff Heller owns various firearms located outside the District of Columbia, including handguns and long guns, and presently intends to possess a functional handgun and long gun for self-defense within his own home, but is prevented from doing so by the defendants' active enforcement of unconstitutional

11. Heller Decl., ¶ 3.

policies complained of in this action. Heller is aware that he faces criminal penalties if he possesses a handgun, or any other functional firearm, at home.	
12. Plaintiff Heller applied to defendant District of Columbia for permission to possess a handgun within his home but was refused.	12. Heller Decl., ¶ 4; Exh. A.
13. Being deprived of a handgun limits Heller's ability to defend himself and his ability to act in concert with others for the common good, as a handgun could often be better suited for such uses than a rifle or shotgun. Being deprived of a functional rifle or shotgun likewise limits Heller's ability to defend himself and his ability to act in concert with others for the common good.	13. Heller Decl., ¶ 5.
14. Plaintiff Tom G. Palmer resides in the District of Columbia.	14. Palmer Decl., ¶ 1.
15. Plaintiff Palmer owns various firearms located outside the District of Columbia, including handguns and long guns, and presently intends to possess a functional	15. Palmer Dec., ¶ 2.

handgun and long gun for self-defense within his own home, but is prevented from doing so only by the defendants' active enforcement of unconstitutional policies complained of in this action. Palmer is aware that he faces criminal penalties if he possesses a handgun, or any other functional firearm, at home.

16. In 1982, Palmer was assaulted by a group of men on account of his sexual orientation. He successfully warded off the assault with a handgun.

16. Palmer Decl., ¶ 3.

17. Being deprived of a handgun limits Palmer's ability to defend himself and his ability to act in concert with others for the common good, as a handgun could often be better suited for such uses than a rifle or shotgun. Being deprived of a functional rifle or shotgun likewise limits Palmer's ability to defend himself and his ability to act in concert with others for the common good.

17. Palmer Decl., ¶¶ 3, 4.

18. Plaintiff Gillian St. Lawrence resides in the District of Columbia.

18. St. Lawrence Decl., ¶ 1.

19. Plaintiff St. Lawrence lawfully owns a registered shotgun, which she keeps in her home. She presently intends to keep the shotgun assembled and unlocked, and presently intends to use the gun if necessary in lawful self-defense within her home, but is prevented by defendants' active enforcement of unconstitutional policies from rendering the gun useful and from ever using the gun in lawful self-defense within the home as otherwise permitted by District of Columbia law. She is aware that she faces criminal penalties if she assembles and unlocks her shotgun at home under any circumstance.	19. St. Lawrence Decl., ¶ 2.
20. Even if she were allowed to piece together, unlock and load the shotgun in self-defense, she may not always be able to do so effectively in response to a sudden home invasion.	20. St. Lawrence Decl., ¶ 3.
21. Being deprived of a functional firearm limits St. Lawrence's ability to defend herself and her ability to act in concert with others for the common good.	21. St. Lawrence Decl., ¶ 4.

22. Plaintiff Tracey Ambeau resides in the District of Columbia.	22. Ambeau Decl., ¶ 1.
23. Plaintiff Ambeau presently intends to possess a functional handgun for self-defense within her own home, but is prevented from doing so only by the defendants' active enforcement of unconstitutional policies complained of in this action. She is aware that she faces criminal penalties if she possess a handgun, or any other functional firearm, at home.	23. Ambeau Decl., ¶ 2.
24. Being deprived of a handgun limits Ambeau's ability to defend herself and her ability to act in concert with others for the common good. While she can use a handgun to defend herself, she cannot use a rifle or shotgun nearly as effectively as she could use a handgun because a rifle or shotgun would be too unwieldy.	24. Ambeau Decl., ¶ 3.
25. Plaintiff George Lyon resides in the District of Columbia.	25. Lyon Decl., ¶ 1.
26. Plaintiff Lyon owns various firearms located outside the District of Columbia, including a handgun and	26. Lyon Decl., ¶ 2.

long guns, and presently intends to possess a functional handgun and long gun for self-defense within his own home, but is prevented from doing so only by the defendants' active enforcement of unconstitutional policies complained of in this action. Lyon is aware that he faces criminal penalties if he possesses a handgun, or any other functional firearm, at home.	
27. Being deprived of a handgun limits Lyon's ability to defend himself and his ability to act in concert with others for the common good, as a handgun could often be better suited for such uses than a rifle or shotgun. Being deprived of a functional rifle or shotgun likewise limits his ability to defend himself and his ability to act in concert with others for the common good.	27. Lyon Decl., ¶ 3.
28. Defendants maintain a complete ban on the home ownership and possession of handguns by private citizens who did not register a handgun prior to September 24, 1976.	28. D.C. Code §§ 7-2502.01(a), 7-2502.02(a)(4); 7-2501.01(12)

29. Defendants prohibit the possession of lawfully owned firearms for self-defense within the home, even in instances when self-defense would be lawful by other means under District of Columbia law.	29. D.C. Code § 7-2507.02
30. A first violation of the District of Columbia's ban on the ownership or possession of handguns or other functional firearms within the home for lawful purposes is punishable as a misdemeanor by a fine of up to $1,000, imprisonment of up to one year, or both. A second offense is punishable as a felony by a fine of up to $5,000, imprisonment of up to five years, or both, in the case of a handgun or other non-registerable firearm.	30. D.C. Code § 7-2507.06.
31. Any person who carries a handgun on his or her own property without a license is subject to one year imprisonment and/or a fine of $1,000.	31. D.C. Code §§ 22-4504, 22-4515.
32. "With very rare exceptions licenses to carry pistols have not been issued in the District of Columbia for many years and are virtually unobtainable."	32. *Bsharah v. United States*, 646 A.2d 993, 996 n.12 (D.C. 1994).

33. Defendants provide handguns to District of Columbia police officers.	33. Heller Decl., ¶ 2; Request for Judicial Notice 1
34. Defendants actively enforce D.C. Code §§ 7-2502.01(a), 7-2502.02(a)(4), 7-2507.02, and 22-4504.	34. Heller Decl., ¶ 2; Exh. A; Request for Judicial Notice 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELLY PARKER, *et al.*,	:	
Plaintiffs,	:	
v.	:	Case No.
DISTRICT OF COLUMBIA, *et al.*,	:	03-CV-0213 (EGS)
Defendants.	:	

DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE EXISTS A GENUINE ISSUE

Pursuant to Rule LCvR 7.1(h) of this Court, defendants submits that there is a genuine issue of material fact as to the following statements in Plaintiff's Separate Statement of Undisputed Material Facts in Support of Plaintiff's Motion for Summary Judgment dated March 14, 2003:

7. Parker presently intends to possess a functional handgun within her home for self-defense, but is prevented from doing so only by defendant's active enforcement of unconstitutional policies complained of in this action. Parker is aware that she faces criminal penalties if she possesses a handgun, or any other functional firearm, at home. (Parker Dec., ¶ 7.)

11. Plaintiff Heller owns various firearms located outside the District of Columbia, including handguns and long guns, and presently intends to possess a functional handgun and long gun for self-defense within his own home, but is prevented from doing so by the defendants' active enforcement of unconstitutional policies complained of in

this action. Heller is aware that he faces criminal penalties if he possesses a handgun, or any other functional firearm, at home. (Heller Dec., ¶ 3.)

13. Being deprived of a handgun limits Heller's ability to defend himself and his ability to act in concert with others for the common good, as a handgun could often be better suited for such uses than a rifle or shotgun. Being deprived of a functional rifle or shotgun likewise limits Heller's ability to defend himself and his ability to act in concert with others for the common good. (Heller Dec., ¶ 5.)

15. Plaintiff Palmer owns various firearms located outside the District of Columbia, including handguns and long guns, and presently intends to possess a functional handgun and long gun for self-defense within his own home, but is prevented from doing so only by the defendants' active enforcement of unconstitutional policies complained of in this action. Palmer is aware that he faces criminal penalties if he possesses a handgun, or any other functional firearm, at home. (Palmer Dec., 1 ¶ 2.)

17. Being deprived of a handgun limits Palmer's ability to defend himself and his ability to act in concert with others for the common good, as a handgun could often be better suited for such uses than a rifle or shotgun. Being deprived of a functional rifle or shotgun likewise limits Palmer's ability to defend himself and his ability to act in concert with others for the common good. (Palmer, Dec., ¶¶ 3,4.)

19. Plaintiff St. Lawrence lawfully owns a registered shotgun, which she keeps in her home. She presently intends to keep the Shotgun assembled and unlocked, and presently intends to use the gun if necessary in lawful self-defense within her home, but is prevented by defendants' active enforcement of unconstitutional policies from rendering

the gun useful and from ever using the gun in lawful self-defense within the home as otherwise permitted by District of Columbia law. She is aware that she faces criminal penalties if she assembles and unlocks her shotgun at home under any circumstance. (St. Lawrence Dec., ¶ 2.)

21. Being deprived of a functional firearm limits St. Lawrence's ability to defend herself and her ability to act in concert with others for the common good. (St. Lawrence Dec., ¶ 4.)

23. Plaintiff Ambeau presently intends to possess a functional handgun for self-defense within her own home, but is prevented from doing so only by the defendants' active enforcement of unconstitutional policies complained of in this action. She is aware that she faces criminal penalties if she possesses a handgun, or any other functional firearm, at home. (Ambeau Dec., ¶ 2.)

24. Being deprived of a handgun limits Ambeau's ability to defend herself and her ability to act in concert with others for the common good. While she can use a handgun to defend herself, she cannot use a rifle or shotgun nearly as effectively as she could use a handgun because a rifle or shotgun would be too unwieldy. (Ambeau Dec., ¶ 3.)

26. Plaintiff Lyon owns various firearms located outside the District of Columbia, including a handgun and long guns, and presently intends to possess a functional handgun and long gun for self-defense within his own home, but is prevented from doing so only by the defendants' active enforcement of unconstitutional policies complained of in this action. Lyon is aware that he faces criminal penalties if he possesses a handgun, or any other functional firearm, at home. (Lyon Dec., ¶ 2.)

27. Being deprived of a handgun limits Lyon's ability to defend himself and his ability to act in concert with others for the common good, as a handgun could often be better suited for such uses than a rifle or shotgun. Being deprived of a functional rifle or shotgun likewise limits his ability to defend himself and his ability to act in concert with others for the common good. (Lyon Dec., ¶ 3.)

The record references relied on to support this Statement of Material Facts as to which There Exists a Genuine Issue relating to these paragraphs are Exhibits A, B, and C to Defendants' Reply Memorandum in Support of their Motion to Dismiss.

Dated: June 3, 2003

Respectfully submitted,

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FILED: June 3, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHELLY PARKER, et al.,	)	
Appellees,	)	
v.	)	Case No. 04-7041
DISTRICT OF COLUMBIA, et al.,	)	**DECLARATION OF SHELLY PARKER**
Appellants.	)	

DECLARATION OF SHELLY PARKER

I, Shelly Parker, am competent to state, and if called upon would testify to the following based on my personal knowledge:

1. On July 26, 2005, I attended a "town hall" meeting on the subject of the District of Columbia's gun bans, at Shaw Junior High School, at Rhode Island Avenue, N.W. and Ninth Street, N.W., in the District of Columbia.

2. Defendant Mayor Anthony Williams, and the Defendant District of Columbia's Police Chief, Charles Ramsey, spoke at this meeting. Both gave rousing, impassioned defenses of the District of Columbia's gun bans.

3. Defendant Mayor Williams called the gun ban a "core law" of the city, part of its "fundamental core culture." In response to a complaint by an Advisory Neighborhood Commissioner that criminals arrested with guns quickly re-appear on the streets with new guns, the defendant Mayor stated, in part, "we need tougher enforcement."

4. Police Chief Ramsey called the challenged laws "good solid laws," and warned, "if we relax our gun laws . . . we are opening the floodgates . . . for unintended [bad] consequences." Ramsey added that 2,000 illegal guns were recovered in each of the past two years, and his department has already recovered 1,400 guns this year, and is therefore on a pace to exceed 2,000 seized guns this year.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 2 day of August, 2005.

/s/ Shelly Parker
Shelly Parker

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHELLY PARKER, et al.,	)	
Appellees,	)	
	)	Case No. 04-7041
v.	)	
	)	**DECLARATION OF**
DISTRICT OF COLUMBIA, et al.,	)	**DICK HELLER**
	)	
Appellants.	)	

DECLARATION OF DICK HELLER

I, Dick Heller, am competent to state, and if called upon would testify to the following based on my personal knowledge:

1. On July 26, 2005, I attended a "town hall" meeting on the subject of the District of Columbia's gun bans, at Shaw Junior High School, at Rhode Island Avenue, N.W. and Ninth Street, N.W., in the District of Columbia.

2. Defendant Mayor Anthony Williams, and the Defendant District of Columbia's Police Chief, Charles Ramsey, spoke at this meeting. Both gave rousing, impassioned defenses of the District of Columbia's gun bans.

3. Defendant Mayor Williams called the gun ban a "core law" of the city, part of its "fundamental core culture." In response to a complaint by an Advisory Neighborhood Commissioner that criminals arrested with guns quickly reappear on the streets with new guns, the defendant Mayor stated, in part, "we need tougher enforcement."

4. Police Chief Ramsey called the challenged laws "good solid laws," and warned, "if we relax our gun laws

. . . we are opening the floodgates . . for unintended [bad] consequences." Ramsey added that 2,000 illegal guns were recovered in each of the past two years, and his department has already recovered 1,400 guns this year, and is therefore on a pace to exceed 2,000 seized guns this year.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 2nd day of August, 2005.

/s/ Dick A. Heller
Dick Heller

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHELLY PARKER, et al., Appellees, v. DISTRICT OF COLUMBIA, et al., Appellants.	)	Case No. 04-7041 **DECLARATION OF GILLIAN ST. LAWRENCE**

DECLARATION OF GILLIAN ST. LAWRENCE

I, Gillian St. Lawrence, am competent to state, and if called upon would testify to the following based on my personal knowledge:

1. On July 26, 2005, I attended a "town hall" meeting on the subject of the District of Columbia's gun bans, at Shaw Junior High School, at Rhode Island Avenue, N.W. and Ninth Street, N.W., in the District of Columbia.

2. Defendant Mayor Anthony Williams, and the Defendant District of Columbia's Police Chief, Charles Ramsey, spoke at this meeting. Both gave rousing, impassioned defenses of the District of Columbia's gun bans.

3. Defendant Mayor Williams called the gun ban a "core law" of the city, part of its "fundamental core culture." In response to a complaint by an Advisory Neighborhood Commissioner that criminals arrested with guns quickly re-appear on the streets with new guns, the defendant Mayor stated, in part, "we need tougher enforcement."

4. Police Chief Ramsey called the challenged laws "good solid laws," and warned, "if we relax our gun laws . . . we are opening the floodgates . . . for unintended [bad] consequences." Ramsey added that 2,000 illegal guns were recovered in each of the past two years, and his department has already recovered 1,400 guns this year, and is therefore on a pace to exceed 2,000 seized guns this year.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1st day of August, 2005.

/s/ Gillian E. St. Lawrence
Gillian St. Lawrence

United States Court of Appeals
for the District of Columbia Circuit

SHELLY PARKER, *ET AL.*, *Plaintiffs-Appellants*,	:	
DISTRICT OF COLUMBIA, *Defendant-Appellee*	:	No. 04-7041

MOTION FOR SUMMARY AFFIRMANCE BY THE DISTRICT OF COLUMBIA AND OPPOSITION TO MOTION TO SET BRIEFING SCHEDULE

The District of Columbia moves for summary affirmance of the district court order dismissing the complaint and entering judgment in its behalf. The District court order is attached.

This litigation is indistinguishable from *Seegars v. Ashcroft* (D.C. Cir. Nos. 04-5016,-5081), in which the court held that identically-situated plaintiffs had no standing to bring a pre-enforcement facial challenge to District laws because none had demonstrated a threat of imminent prosecution.

Seegars is dispositive. No briefing or oral argument is warranted.

STATEMENT IN SUPPORT

As in *Seegars*, the complaint in this litigation asserts that District laws regulating firearms possession violate the Second Amendment. (The complaint is attached). The *Seegars* complaint challenged the identical laws on the same ground.

Seegars held that none of the plaintiffs had alleged "prior threats against them or any characteristics indicating an especially high probability of enforcement against them." Slip op. at 12. Although one of the plaintiffs owned a pistol outside the District that he wished to import into the District and another owned a registered shotgun but wanted to keep it unlocked in violation of District law, neither they nor the other plaintiffs had been personally threatened with prosecution: none had shown that their prosecution had any special priority for the government. *Id.* at 13. Accordingly, the *Seegars* plaintiffs had presented no justiciable case or controversy. *Id.* at 15.

Here, too, the complaint does not assert an especially high probability of enforcement against these plaintiffs or their imminent prosecution under the laws they challenge. It recites that they "presently intend" to have handguns in their homes. Complaint at 2-4. Some plaintiffs own pistols outside the District that they would like to import. *Id.*, ¶¶ 2, 3, 6. One alleges ownership of a registered shotgun that she wishes to unlock. *Id.* ¶ 4. The complaint asserts merely that plaintiffs fear possible arrest and prosecution. It does not allege that the plaintiffs were personally threatened with prosecution or that the government had demonstrated it placed a higher priority on prosecuting them than anyone else caught violating these misdemeanor laws. When the plaintiffs moved for summary judgment, their supporting affidavits did not significantly stray beyond the complaint's allegations. *See* attachments 4, 5, 6, 7, 8, 9 to docket entry no. 4.

In an attempt to distinguish the undistinguishable, plaintiffs seize on a newspaper article in which a spokesman for the Mayor asserted that the Mayor supported existing law and suggested that "people" who are armed

can be a danger to themselves and others. Parker mot. at 2-3, 6, & att. A. The newspaper article is hearsay. It is not part of the record on appeal. *See Frito-Lay, Inc. v. Willoughby,* 863 F.2d 1029, 1035-36 (D.C. Cir. 1988) (refusing to consider on appeal evidence not before the district court at the time it granted summary judgment). The spokesman is not a police official or a prosecutor. More to the point, he said nothing suggesting that these plaintiffs were being targeted for imminent arrest or prosecution. At most, his remarks can be read as stating a general policy that the District intends to enforce its weapons laws.

In another stretch to distinguish *Seegars,* plaintiffs' motion misconstrues colloquy in the district court on the hearing for summary judgment. The trial judge there expressed surprise that the District had not yet argued standing in its pleadings and motions. Parker mot., att. B at 8. Civil counsel for the District (who is not a prosecutor) responded that she believed plaintiffs had no standing and that their allegations were "abstract." *Id.* The trial judge countered that the allegations were not abstract:

> The city is not going to essentially grant immunity to these people. *If* they go out and take steps to possess firearms, they'll be prosecuted, *I assume.* They're not going to get a free ride because they're a plaintiff in this case, are they?
>
> [Counsel]: No, and I think your honor is correct, but I don't think that *if, in fact,* they break the law and we would enforce the law that they're breaking, that necessarily confers automatic standing on them in this case. It's still a situation where you're dealing with the abstract.

Id., 8-9; italics added.

It is evident that civil counsel said no more than that District laws will generally be enforced if violated. *See Seegars,* slip op. at 12 (noting that the District has stated in previous litigation that it would prosecute "all violators of the [firearm] statute[s] under normal prosecutorial standards," quoting *Austin v. United States,* 847 A.2d 391, 393-394 (D.C. 2004); brackets added). Counsel agreed with the trial judge that the *Parker* plaintiffs would not "get a free ride" because of their involvement in this litigation. Far from issuing specific and personal threats of prosecution, she couched her language in the conditional tense: *if* they break a law, the District would normally enforce it. As matters currently stood, however, the "situation" was still too abstract. While her phrasing may have been inartful, nothing civil counsel said amounted to a threat of imminent, targeted, prosecution of these plaintiffs.

Following the trial court hearing, the District briefed the standing issue (docket entry no. 30) and plaintiffs filed a response (docket entry 32). Although the district court did not address standing in its opinion (311 F. Supp.2d 103), the issue of jurisdiction is always before the reviewing court. *Kontrick v. Ryan*, 540 U.S. 443, ___, 124 S. Ct. 906, 915 (2004), citing *Mansfield, C. & L.M.R. Co. v. Swan,* 111 U.S. 379, 382 (1884); *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 96 (1998) (court of appeals has "special obligation" to determine jurisdiction, quoting *Mitchell v. Maurer,* 293 U.S. 237, 244 (1934)). The absence of standing is jurisdictional. It means that the case presents no justiciable case or controversy. *Seegars,* slip op. at 15. To the extent that the district court reached the merits rather than dismissing this action on jurisdictional grounds, *Seegars* establishes that it erred.

CONCLUSION

On the basis of *Seegars*, the judgment dismissing the complaint should be summarily armed for lack of jurisdiction.

Respectfully submitted,

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February 23, 2005

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7041 **September Term, 2005**

03cv00213

Filed On: November 2, 2005 [929164]

Shelly Parker, et al.,

Appellants

v.

District of Columbia,

Appellee

BEFORE: Henderson, Randolph, and Brown, Circuit Judges

ORDER

Upon consideration of the initial motion to issue a briefing schedule and set oral argument on the merits, the opposition thereto and motion for summary affirmance, the reply to the opposition to the initial motion and opposition to the motion for summary affirmance, the reply to the opposition to the motion for summary affirmance, the second motion to issue a briefing schedule and set oral argument on the merits, the opposition thereto, the reply, the motion to remand with instructions to dismiss or, alternatively, for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion for summary affirmance and the motion to remand with instructions to dismiss or, alternatively, for summary affirmance be denied. The merits of the parties' positions are not so clear as to

warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley,* 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). It is

FURTHER ORDERED that the motions to issue a briefing schedule and set oral argument on the merits be granted. The Clerk is instructed to calendar this case for presentation to a merits panel, and the parties are instructed to address both standing and the merits of the case in their briefs.

Per Curiam

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January 11, 2007

Mark J. Langer, Clerk
United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: *Parker, et al. v. District of Columbia, et al.*
U.S. Court of Appeals, D.C. Cir. No. 04-7041

Supplemental Authority Per Rule 28(j)

Dear Mr. Langer:

Appellants call to the Court's attention the Supreme Court's decision this week in *Medimmune, Inc. v. Genentech, Inc.*, ___S.Ct.___, 2007 U.S. LEXIS 1003 (Jan. 9, 2007), observing:

> where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat – for example, the constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law *eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.*

Id., at *19-20 (latter emphasis added). In discussing various cases where pre-enforcement standing was found

to challenge the constitutionality of criminal acts, the Supreme Court explained:

> In each of these cases, the plaintiff had eliminated the imminent threat of harm by simply not doing what he claimed the right to do. . . . That did not preclude subject-matter jurisdiction because the threat-eliminating behavior was effectively coerced. The dilemma posed by that coercion –putting the challenger to the choice between abandoning his rights or risking prosecution – is "a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate."

Id., at *21 (citations omitted).

To the extent Appellants' standing is based upon pre-enforcement threat of prosecution, *Medimmune* is inconsistent with Appellees' interpretation of circuit precedent, purporting to impose an additional standing requirement that Appellants have been under present, imminent threat at the time of filing suit. *Medimmune* makes explicit that even if the threat is "eliminated," standing exists, because the "elimination" of the threat was coerced by the law.

Of course, *Medimmune* does not speak to Appellants' other equally valid standing claim, the injury-in-fact occasioned by the denial and non-availability of a permit.

Sincerely,

/s/ Alan Gura, Esq.
Alan Gura, Esq.

cc: All Counsel of Record

The body of this letter contains 285 words.

D.C. Code § 7-2507.02 Firearms required to be unloaded and disassembled or locked

Except for law enforcement personnel described in § 7-2502.01(b)(1), each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia.

D.C. Code § 7-2507.06. Penalties

Any person convicted of a violation of any provision of this unit shall be fined not more than $1,000 or imprisoned for not more than 1 year, or both; except that:

(1) A person who knowingly or intentionally sells, transfers, or distributes a firearm, destructive device, or ammunition to a person under 18 years of age shall be fined not more than $ 10,000 or imprisoned for not more than 10 years, or both.

(2) (A) Except as provided in subparagraph (B) of this paragraph, any person who is convicted a second time for possessing an unregistered firearm shall be fined not more than $ 5,000 or imprisoned not more than 5 years, or both.

(B) A person who in the person's dwelling place, place of business, or on other land possessed by the person, possesses a pistol, or firearm that could otherwise be registered, shall be fined not more than $ 1,000 or imprisoned not more than 1 year, or both.

(3) A person convicted of knowingly possessing restricted pistol bullets in violation of § 7-2506.01(3) may

be sentenced to imprisonment for a term not to exceed 10 years and shall be sentenced to imprisonment for a mandatory-minimum term of not less than 1 year and shall not be released from prison or granted probation or suspension of sentence prior to serving the mandatory-minimum sentence, and, in addition, may be fined an amount not to exceed $ 10,000.

D.C. Code § 22-4504. Carrying concealed weapons; possession of weapons during commission of crime of violence; penalty

(a) No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in § 22-4515, except that:

(1) A person who violates this section by carrying a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon, in a place other than the person's dwelling place, place of business, or on other land possessed by the person, shall be fined not more than $ 5,000 or imprisoned for not more than 5 years, or both; or

(2) If the violation of this section occurs after a person has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or another jurisdiction, the person shall be fined not more than $ 10,000 or imprisoned for not more than 10 years, or both.

(b) No person shall within the District of Columbia possess a pistol, machine gun, shotgun, rifle, or any other firearm or imitation firearm while committing a crime of violence or dangerous crime as defined in § 22-4501. Upon conviction of a violation of this subsection, the person may be sentenced to imprisonment for a term not to exceed 15 years and shall be sentenced to imprisonment for a mandatory-minimum term of not less than 5 years and shall not be released on parole, or granted probation or suspension of sentence, prior to serving the mandatory-minimum sentence.

D.C. Code § 22-4515. Penalties

Any violation of any provision of this chapter for which no penalty is specifically provided shall be punished by a fine of not more than $ 1,000 or imprisonment for not more than 1 year, or both.